10789

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AW/LSC/2015/79**
Property	:	**Flat 3, 10 Lennox Gardens, London SW1X 0DG**
Applicant	:	**Mr F Masri**
Representative	:	**In person**
Respondent	:	**10 Lennox Gardens Ltd**
Representative	:	**Stuart Armstrong (Counsel) on behalf of Astberrys Property Services Limited (managing agents)**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Robert Latham** **Neil Martindale FRICS**
Date and venue of hearing	:	**22 April 2015 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**24 April 2015**

DECISION

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Decisions of the Tribunal

(1) The Tribunal determines to reduce the sum which the Respondent is entitled to recover for the Accountant's Fees from £1,200 to £840. The Applicant is liable for 14.09% of this sum and is entitled to a reduction to his service charge of £50.72.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(3) The Tribunal determines that the Respondent shall pay the Applicant £255 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

(4) The Tribunal dismisses the application for costs made by the Respondent against the Applicant pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The Application

1. The Applicant, Mr Masri, seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge year 2011. The application relates to a single item in the service charge account, namely the Accountants' Fees of £1,200. The Applicant states that this is a specimen year. It is probable that our determination will also apply to the year 2010.

2. The Tribunal initially directed that this matter should be determined on the papers. However, in the light of Mr Masri's allegations of serious misconduct by the landlord, the Tribunal set this matter down for an oral hearing. Ms Nancy Lewis, the landlord's Chartered Accountant, was not available to attend to be cross-examined as she is in Dubai. On 10 April, she filed a second witness statement. Mr Masri only received this at the hearing.

3. Mr Masri appeared in person. He has appeared on a number of previous occasions before this Tribunal. Mr Stuart Armstrong (Counsel) appeared on behalf of the Respondent landlord. Both parties made oral representations on the written material before the Tribunal.

4. This application raises two important points of principle arising from the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"):

(i) Rule 3: The Overriding Objectives. The Tribunal seeks to deal with case fairly and justly. However, it is important that both the parties and the tribunal deal with cases in ways which is proportionate to the importance of the case. The Applicant challenges a single item in the service charge account which he considers should be reduced from £1,200 to £840. It has been necessary for the Tribunal to give Directions on three occasions, namely 17 February, 30 March and 15 April 2015. We have been provided with two Bundles of Documents: (i) The Applicant's Bundle extends to 121 pages; (ii) the Respondent's Bundle, prepared by Solicitors, ends to 82 pages. There is a considerable degree of duplication. Both parties provided Skeleton Arguments. The Tribunal have read all the material placed before us. We are satisfied that the issue in dispute should be determined in a proportionate manner. We therefore set out our decision on the substantive issue briefly.

(ii) Rule 13: Costs on Grounds of Unreasonable Conduct. Both parties indicated that they wish to pursue such applications. In the light of a strong indication from the Tribunal that neither party would meet the high threshold that is required before such an order is made, the Applicant withdrew his application. Mr Armstrong, "on instructions", proceeded with his application. This Tribunal reiterates that such applications should only be made in exceptional circumstances.

Our Determination

5. The block at 10 Lennox Gardens consists of 5 flats. One tenant holds two leases. Three of the tenants are both shareholders and directors of the Respondent freehold Company. Mr Masri is the only tenant who does not have an interest in the freehold company. He is required to pay 14.09% of the service charge for the block. The block is managed by Urang Property Management Ltd.

6. Mr Masri challenges the sum of £1,200 (inc VAT) included in the 2011 service charge accounts. Whilst the accounts are headed "Service Charge Accounts", they also include the "Freeholders' Expenditure" which is divided between the three tenants who have an interest in the freehold company. Hodgson Hickie, the accountants, also prepared a set of "dormant accounts" to be filed at Companies' House on behalf of the freehold Company which, despite entering into, receiving and paying for various contracts for services in respect of its freehold asset, is we were told, apparently not trading. A similar sum of £1,200 also appeared in the accounts for 2010.

7. Mr Masri makes a simple point. He contends that the sum of £1,200 not only includes the cost of preparing the service charge accounts, but also the freeholder's accounts. It is agreed that the cost of preparing the freeholders' accounts is £360. Therefore, the service charge account should only be charged with the net sum of £840.

8. Mr Masri relies on two invoices in support of his case. On 2 July 2012, Hodgson Hickie issued an invoice in the sum of £1,200 to the managing agents for services stated to be (i) "Provision of professional services in connection with the preparation and compilation of the company's accounts for the year ended 31 December 2011" and (ii) "Provision of professional services in connection with the preparation and compilation of the service charge accounts for the year ended 31 December 2011". He subsequently established that an invoice in the same sum was submitted in identical terms for the 2010 accounts on 3 August 2011. Mr Masri argues that the only proper inference is that the invoices extend to the work involved in preparing the freeholders' accounts and that he should not be liable to that part of the work.

9. Mr Armstrong rather sought to argue that, despite the express wording of the 2011 and 2010 invoices, they only related to the service charge accounts. There was a drafting error and should not have extended to the freeholders' accounts. Ms Lewis contends in her two statements that whilst no separate invoice was raised in respect of the freeholders' accounts, she had included £360 under Freeholders' Expenditure under an expenditure heading "Company Expenses". This totalled £786, the other item being £426 for Company Secretary Services. The landlord conceded that no invoice was raised or paid in respect of this sum of this charge. However, she explains that she prepared the accounts on an accrual basis. Ms Lewis was not available to be cross-examined on her statements.

10. The Tribunal make the following observations:

(i) Transparency requires that service charge accounts should be backed up by invoices. The relevant invoice (2.7.12) clearly state that the sum claimed extends to both the service charge and the freeholders' accounts.

(ii) Having demanded and accepted payment on this basis, it is questionable whether it was open to Hodgson Hickie to demand further payment for work in respect of which they had already submitted an invoice and for which they had been paid.

(iii) It is common ground that Hodgson Hickie did not submit separate invoices in respect of their work on the freeholders' accounts until 17 March 2015, when £310 (inc VAT) was claimed for 2010 and £360 for 2011. Mr Armstrong conceded that this invoice would not have been issued but for Mr Masri's application to this Tribunal. It seems to have been issued to add substance to the Respondent's case.

(iv) It is common ground that the work on the service charge and freeholder accounts was billed and paid in a similar manner in 2010. The relevant invoice is dated 3 August 2011.

(v) In her two witness statements, Ms Lewis asserts that this was a mistake. To make such a mistake once may be regarded as misfortunate. To make it twice calls for a much clearer explanation than Ms Lewis has been able to provide in her two witness statements. Ms Lewis has not explained why the sum of £360 did not appear under the Freeholders Expenditure as "Accountants' Fees", as she had described it in the Service Charge Accounts. The Tribunal has not been provided with the 2010 accounts; we were therefore unable to see how the sum of £310.20 appeared, if at all, in these accounts. Ms Lewis states that the accountancy fees were "a fixed fee agreed in advance"; however, no memoranda have been produced to confirm when and between whom these fixed fees had been agreed. Ms Lewis asserts that the sum of £360 appeared in the ledger maintained by the managing agents; this ledger was not produced. It is surprising that such sums should have appeared in the ledger if no invoice had been raised and the sum had not been paid.

11. Having regard to the above, the Tribunal prefers the submissions made by Mr Masri. We construe the relevant invoice (2.7.12) as making a demand for £1,200 for payment for the preparation of both the service charge and the freeholder accounts. Only the cost of preparing the former should have been included in the service charges passed on to the tenants. We therefore reduce the sum of £1,200 to £840.

12. The Tribunal have also asked ourselves whether £1,000 + VAT is a reasonable charge for preparing these very straight forward service charge accounts. We would have concluded that it is not.

The Rule 13 Application for Costs

13. Rule 13 of the Tribunal Procedure Rules provide (emphasis added):

> "(1) The Tribunal may make an order in respect of costs only:
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> .... (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in ...(ii) a leasehold case ...."

14. The Tribunal Procedural Rules have applied since 1 July 2013 and make two significant changes to Rule 13(1)(b) to those that were previously to be found in Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002:

> (i) The 2002 Act referred to the conduct of a party who had "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably" in connection with the proceedings.
>
> (ii) The limit of £500 has been removed. This gives effect to the recommendation made at [105] in the report "Costs in

Tribunals" by the Costs Review Group chaired by Sir Nicholas Warren. The Committee suggested that the means of the parties may be a relevant factor in assessing the size of any order.

15. The Tribunal has regard to the guidance provided by HHJ Huckinson in *Halliard Property Co Ltd v Belmont Hall and Elm Court RTM Company Limited* LRX/130/2007; LRA/85/2008 in respect of the 2002 Act at [36]:

> "So far as concerns the meaning of the words "otherwise unreasonably", I conclude that they should be construed *ejustem generis* with the words that have gone before. The words are "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably". The word "otherwise" confirms that for the purposes of paragraph 10 behaviour which was frivolous or vexatious or abusive or disruptive would properly be described as unreasonable behaviour. The words "or otherwise unreasonably" are intended to cover behaviour which merits criticism at a similar level albeit that the behaviour may not fit within the words frivolously, vexatiously, abusively or disruptively. I respectfully adopt the analysis of Sir Thomas Bingham MR (as he then was) in *Ridehalgh v Horsefield [1994] 3 All ER 848* as to the meaning of "unreasonable" (see paragraph 13 above) which I consider equally applicable to the expression "otherwise unreasonably" in paragraph 10 of schedule 12 to the 2002 Act. Thus the acid test is whether the behaviour permits of a reasonable explanation."

16. In *Ridehalgh v Horsefield,* Sir Thomas Bingham dealt with the word "unreasonable" in the context of a wasted costs order in the following terms:

> "'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simple because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

17. The Tribunal is satisfied that an order for costs should only be made under Rule 13(1)(b) if on an objective assessment a party has behaved so unreasonably that it is only fair and reasonable that the other party is compensated by having their legal costs paid.

18. Mr Armstrong contends that the following constitute unreasonable conduct justifying a penal costs order:

(i) The inadequacy of the pre-action correspondence. He refers us to Mr Masri's letter dated 23 January and the landlord's response dated 26 January 2015.

(ii) The intemperate language which Mr Masri used in his letter of 20 March 2015. Mr Armstrong contends that the tribunal only set the matter down for an oral hearing because of the allegations of grave misconduct,

(iii) The failure of Mr Masri to withdraw his allegations of grave misconduct. Had Mr Masri done so, it is suggested that the Tribunal would have issued further directions for there to be a paper determination.

19. The Tribunal declines to make a wasted cost's order under Rule 13. The Applicant has not satisfied the Tribunal that the conduct of the Respondent is so unreasonable as to merit a penal costs order. Since the current Tribunal Rules were introduced, there have been an increasing number of applications for penal costs. This Tribunal would stress that this is normally a "no costs" jurisdiction. A penal costs order should only be made in an exceptional case. The current case does not fall within this category.

20. In service charge disputes, most parties are unrepresented. Most managing agents are not legally qualified. The law in this area is complex. Litigation can lead parties to take entrenched positions, the party in the stronger position seeking to take tactical advantage. The role of the Tribunal is to ensure that both landlord and tenant should have access to justice and to enable both parties to participate fully in the proceedings. The Tribunal gives Directions to assist the parties to identify the substantive issues in dispute between them to enable those issues to be determined in a proportionate manner, having regard to the resources of the parties. The Tribunal encourages best practice. It expects higher standards from those who are legally represented that from those who are not. However, were the Tribunal to adopt an unduly punitive approach to applications for costs under Rule 13, could have a chilling effect upon access to justice. Parties with good claims could be deterred from bringing them before the tribunal.

21. We turn to the three issues raised by Mr Armstrong:

(i) This Tribunal does not require pre-action correspondence. On 17 February 2015, Judge Andrew gave Directions in this case. He clearly identified the issue in dispute. He noted that the amount in dispute seemed to be modest. The Tribunal is surprised that the Respondent did not concede the claim at this stage given the small size of the sum in dispute and the wholly inadequate manner in which Hodgson Hickie had billed their fees for preparing the relevant accounts.

(ii) Any lawyer would recognise that allegations of "attempted deception" and "serious misconduct" should only be made where there is clear and cogent evidence to support such aspersions. Lawyers also know that to make such allegations where there is no such evidence is likely to seriously undermine their client's case. This Tribunal is used to dealing with litigants in person and seeks to defuse the heat generated by any litigation. Mr Masri was clearly not impressed by the witness statement filed by Ms Lewis. She suggested that she had made a mistake. She did not concede that she had made an identical mistake in the previous year. Her explanation for her mistake did not impress us. Neither did it impress Mr Armstrong who explained how he had advised that a second witness statement was required. Whilst we deplore the intemperate language used by Mr Masri, this does not justify a penal cost's order.

(iii) Having decided that an oral hearing was required, we are satisfied that the Tribunal would not have relisted this matter for a paper determination even had the allegations of misconduct been withdrawn. Neither party assisted the Tribunal in ensuring that this matter could be determined in a proportionate manner. Given the entrenched approach adopted by both parties, the Tribunal had concluded that an oral hearing was required to fairly determine the dispute. We are surprised that the Respondent considered that Counsel was required given the small sum in dispute.

Application under Section 20C and refund of fees

22. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondent to refund the fees of £255 paid by the Applicant within 28 days of the date of this decision.

23. The Applicant also applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Judge Robert Latham

23 April 2015